

The right to water: dimension and opportunities

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Abstract

Water is today subject of debate in the international arena due to the deep politic, economic and social implications it carries, along with challenges that require strong commitment by governments and international agencies. In this article, the author intends to obtain a broader and more specific perception on the current condition of the so denominated [Human] Right to Water. In order to do so, a theoretical revision of the subject is conducted, using as methodology secondary sources, from which a descriptive analysis was made in order to obtain a better understanding of the matter.

Furthermore, the influence of the international community in the subject is taken into account as how the precedents regarding human rights influence the situation, and how ECOSOC's General Comment 15 is currently the latest international pronouncement. Then, it analyses how governments implement the Right to Water domestically and how the case of South Africa is one of the most important examples. After a deep analysis, the main conclusion found is that this issue, even though has had some progress, it still has a significant number of defiance ahead that will require joint and dedicated action both internationally and domestically.

Through out all the history of mankind, water has been a central element of its progress, allowing the improvement and development of agriculture, household, industry, trade and commerce, among other activities that are part of the development obtained until today.

Unfortunately, considering geographic conditions, not all the countries have had the same kind of access to water resources, increasing the inequalities and the possibility of entering into conflicts. This situation becomes more complex taking into account that only 2,5%¹ of those water resources constitute freshwater, meaning able for human utilization.

In the last few decades, the quality and degree of contamination of this essential resource as a consequence of industrialization and human consumption, has upheld numerous debates in different meetings and conventions, highlighting, mostly by civil society, IIOO, NGO's and some governments, the relevance of cooperation and the achievement of a common understanding in relation with this fundamental natural resource.

For that reason, it has been commonly mentioned, both in the international as in the national arena, the necessity of implementing water as a fundamental right², creating the right to water. In the present article, the elements and implications of this discussion will be presented, as well as some results already obtained. In the first part, the role of the International Community will be analyzed: taking as an approach Human Rights: prior conventions that are related to the subject, its division and the most recent attempt to make water as a fundamental right: the General Comment 15.

In the second part, the role of the domestic government in implementing the right to its national constitution, and the case of South Africa being a country that already has water as a primary right, will be considered.

1. United Nations Development Program, "UN World Water Development Report", Web site Human Development Reports, [Online] available in: http://hdr.undp.org/en/media/HDR_2006_ES_Complete.pdf, access: March 29th of 2010.

2. United Nations Development Program, "World Water Council. Introduction. The Right to Water: From Concept to Implementation". 2006. [Online] available in: http://www.worldwatercouncil.org/fileadmin/wwc/Library/RightToWater_Final_Text_Cover.pdf, access: March 29th of 2010.

1. The role of the international community in the achievement of the right to water

The role that the International Community has played in creating consciousness regarding the water's situation in subjects such as quality, level of access, availability, sanitation, opportunities for cooperation, dangers of conflict, among other relevant issues, all of them in an international scope, has been extremely influential. This, considering

that NGO's, civil society associations, multilateral and international organizations, have gathered and analyzed information, made recommendations and in not few occasions, complaints against states with critical conditions.

Increased scarcity leads companies to want to take more advantages of some governments' incapacity of providing water services, increasing the possibility of developing legislation pro-privatization, and darkening the options for a right to water.

Besides of the environmental implications that the subject of water carries, the preoccupation raised by the inequalities regarding mainly its access and quality, has stimulated serious concerns and the hypothesis that the best way to address this problem is to elevate its condition to a human right, the human right to water.

In order to comprehend this, is necessary first to understand the international approach to human rights, and then, the most recent attempt by the international community, more specifically by an UN organ, the ECOSOC, to tackle this concern, the General Comment 15.



1.1 An essential approach to Human Rights

Under the 1948 Universal Declaration of Human Rights, the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.³ This includes fundamental rights like the right to life and health.

Water has been recognized to have a secondary role in the achievement of these and other fundamental rights, and the explicit recognition “of water as an individual human right”⁴ has not take place yet, being only mentioned in an implicit way, as part of rights “contained within the ICESCR [International Covenant on Economic, Social and Cultural Rights] 1966, such as an adequate standard of living, food and health”.⁵

The first time that it was explicitly acknowledged was in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979) in the Article 14: “To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communication”⁶. And in the Convention on the Rights to the Child (CRC, 1989),⁷ where in the Article 24 it is stated that “to combat disease and malnutrition, including within the framework

3. The Universal Declaration of Human Rights 1948.

4. Amanda Cahill, “The Human Right to Water – A Right of Unique Status”: The Legal Status and Normative Content of the Right to Water”, *The International Journal of Human Rights*, vol. 9, num. 3, September 2005, p. 390.

5. *Ibid.*

6. Right to Water, “The Right to Water in International Human Law Rights Law”, Web site The Right to Water, [Online] available in: http://www.righttowater.info/code/Legislation_1.asp, access: march 29th of 2010.

7. Right to Water, “The Right to Water: A Legal Obligation”, [Online], available in: www.righttowater.org, access: March 29th of 2010

of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution;”⁸ In addition to this, children in areas where the access is very scarce and difficult, they have to walk several kilometers every day⁹ in order to obtain enough amounts of water for their families to survive, eliminating their opportunity to go to school and improve their quality of life.

Water is viewed as a “derivative right”,¹⁰ meaning that it derives “from other related or “dependent” rights”¹¹ (education, food, health, housing, and the right to life.). Also, according to Bluemel,¹² the right to water can be characterized internationally in one of three ways: 1) as **subordinate** to other primary human rights, such as health or life; 2) as **subordinate** and necessary to achieve economic and socio-cultural rights; or 3) as **independent** human right.

In this point, it is important to recognize that the State obligations differ in each of the three conditions mentioned above: it is understandable that if it gains the condition of independent right, it will represent a greater amount of responsibilities to the governments than if it gains one of the first two characterizations. For governments, this can be a significant source of obstacles to achieve this condition. On the contrary, for people, this third condition will be the most beneficial, because it would facilitate them more legal instruments to exercise its right.

People in developing countries are the one who suffer the most from the water inequalities in access, quality and availability, being at the same time, the ones who need the most this right to water. This is reflected in the serious and concerning statistics elaborated by international organisms, which show that 1.1 billion people lack access to an adequate supply of water; 2.6 billion people lack access to adequate sanitation and 1.8 million children die every year as a result of diseases caused by unclean water and poor sanitation.¹³

These conditions can get worse by the government’s behavior regarding this issue: there are no few of them which are not able to provide adequate water services (sanitation), having then to privatize the service, generating in many occasions more problems than benefits.

This issue will be deeply analyzed next, taking also into account the influence exercised in the discussion of water as a Human Right by the ECOSOC and its General Comment 15.

8. *Ibíd.*

9. UN World Water Development Report, *Op. Cit.*

10. Amanda Cahill, “The Human Right to Water – A Right of Unique Status: The Legal Status and Normative Content of the Right to Water”, *The international journal of human rights*, vol. 9 num.

9, September 2005, p. 391

11. *Ibíd.*

12. Erik, B. Bluemel, “The Implications of Formulating a Human Right to Water”. *Ecology Law Quarterly*, vol. 31, 2004, p. 967.

13. UN World Water Development Report, *Op.*

Cit., p. 4

1.2 General Comment 15: the opinion of the ECOSOC

The first approach by international community dealing with water difficulties was to treat it as an economic good,¹⁴ developing the concept of “water privatization”. Unfortunately, this focus proved to increase the inequalities among the communities, due to the high prices that the companies charged to them, trying to recover the investment made (“full cost recovery” principle).¹⁵ The case of Cochabamba, Bolivia¹⁶ is one of the most documented and discussed internationally, due to the negative outcomes that privatization brought to this community in both economic and social aspects.

As consequence of the increasing attention received worldwide, regarding the already mentioned inequalities and the not so positive results of this policy of privatization, the international community began to draft attempts to treat water as an independent Human Right.

Within the UN framework, this job was given to the ECOSOC, who had to take into account the segmentation between the rights that are included in the International Covenant on Economic, Social and Cultural Rights (ICESCR), and those included in the International Bill of Human Rights, regarding the international enforcement that they have, the instruments of the latter have more force legally speaking. As a result of this work, the General Comment 15 was adopted in 2002¹⁷ by the ECOSOC, who uses this tool to “provide guidelines”¹⁸ to States in the interpretation of punctual issues related with its treaty concerning Human Rights.

In this case, the General Comment made by the ECOSOC was regarding the ICESCR and its Articles 11 (the right to adequate standard of living) and 12 (the right to health),¹⁹ and mentions the importance of recognizing water “as a social and cultural right”²⁰

The Comment defines the extent of the right in relation with availability, quality and accessibility (physical, economic and information accessibility, besides of non-discrimination),²¹ as the major elements in which the governments must focus its task. Additionally, it’s level of detail, allocates a considerable level of responsibility and action for states.²² And finally, it contributes with a more intangible aspect, the strong support that it gives to the human right to water.

Unfortunately, the GC15 is not comprehensible in relation with the “additional legal weight”²³ it gives to the right to water, being that

14. Erik, B. Bluemel, *Op. Cit.*, p. 962

15. *Ibid.*, p. 962.

16. Harvard Law Review “What Price for the Priceless?: Implementing the Justiciability of the Right to Water”, *Harvard Law Review*, vol. 20 num. 4, 2007, p.1077

17. General Comment 15, The right to water, Economic and Social Council Doc. E/C.12/2002/11, UN ECOSOCOR, 29th Sess., 2002.

18. *Ibid.*

19. *Ibid.*

20. What Price for the Priceless?: Implementing the Justiciability of the Right to Water, *Op. Cit.*, p. 1075.

21. Amanda Cahill, *Op. Cit.*, p. 391.

22. Amy Hardberger, “Whose Job Is It Anyway?: Governmental Obligations Created by the Human Right to Water”, *Texas International Law Journal*, vol. 41, num.3, 2006, p. 539.

23. Erik, B. Bluemel, *Op. Cit.*, p. 972.

General Comments are not-binding for states, and it relates it only by its importance with other Human Rights.

Besides, it is considered that the “[c]ommittee’s analysis of a right to water addressed only impacts on individuals without considering impacts on governments”²⁴, making more difficult for the latter to take the possible legal paths to reach an optimal point.

2. Case study: South Africa as an example of how States implement the right to water



In each state the processes of creating and/or implementing new laws can be very different, in each one, there is a different social, economical, political and cultural context that makes it unique. This is one of the possible reasons why some countries in history have not had the need to wait until an international treaty or law be established in order to implement it domestically (in this case, a human right). This does not mean that only the will of a state is necessary, on the contrary, many times it requires a great deal of work, time, money and effort to reach the desired objective.

In the present section, the role of governments will be analyzed in how they can collaborate in achieving a human right to water, and then, in order to have a better understanding of how are the dynamics in a country that already has this right within its legislation, the case of South Africa will be explored.

2.1 The role of government: implementing the right domestically

Under International Law, a State does not have to agree to be bound to an idea, and this has even more applicability when it is related with Rights, which function as implicit requirements of society.²⁵

Nevertheless, according to Hardberger, even though the need to ensure water access has increased around the world, it has not reached yet the level of customary international law.²⁶ This is possibly because states do not have yet the sense of obligation (*opinio juris*) required, making more difficult the road to achieve a universal right.

24. *Ibid.*, p. 962.

25. Amy Hardberger *Op. Cit.*, p. 536.

26. *Ibid.*, p. 538

However, this does not mean that any state has recognized the vital importance of implementing water as a fundamental right under its domes-

tic constitution, on the contrary, there are numerous cases of countries that have already done it, amongst them, can be found Ethiopia, Gambia, Uganda, Zambia and South Africa²⁷, which will be analyzed next.

Of these countries, it is of paramount importance to highlight their condition of Least Developed Countries (LDC's)²⁸, with the exception of South Africa, which is developing. These are countries (the LDC's) that do not have great amount of resources available, but have seen this as a chance to improve their inhabitants' quality of life. This does not mean, nonetheless, that for these countries this is the final and exultant end, on the contrary, this is just the beginning, because the work of putting into action the words of the Constitution can be even more stringent and constraining.

In a general context, the role that each state play in the consecution of any human right implies certain obligations such as **respect, protect** and **fulfill** the right to water²⁹, involving a positive right approach to the topic.³⁰ Nonetheless, one of the critics made to the GC15 is that "little discussion has focused on the practical [entailment] of recognizing a right to water from the perspective of State"³¹, which could ultimately hinder his role, unless further development is made.

2.2 South Africa: first steps in ensuring the right to water

After suffering approximately five decades under a regime that basically enforced discrimination and inequality among its inhabitants, South Africa is now one of the privileged countries that counts with water as one of its fundamental rights. In its constitution, in Section 27, article 1 is established: "Everyone has the right to have access to".³² This Constitution was created in 1996, and after that, several projects have been designed in order to comply with this Article: Water Act (1998), Policy on Free Water (2001), Strategic Framework for Water Services (2003), National Water Resources Strategy (2004),³³ among others that respond to other issues such as sanitation and other free water policies.

This case shows the importance that economic and social rights are receiving in one country, considering that they are most presumably, one of the best choices to solve problems related with poverty, discrimination and inequalities, some of the biggest challenges that governments have to deal with around the world, especially in the LDC and developing countries.

27. The Right to Water in International Human Law Rights Law, *Op. Cit.*

28. UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and the Small Island Developing States (UN-OHRLLS), "Least Developed Countries", Web Site UN-OHRLLS, [on line] available in " <http://www.unohrls.org/en/ldc/related/62/>

29. General Comment 15, *Op. Cit.*, p.10.

30. What Price for the Priceless?: Implementing the Justiciability of the Right to Water , *Op. Cit.*, p 1076

31. Erik, B. Bluemel, *Op. Cit.*, p. 986.

32. South African National Constitution, 1996 .

33. Right to Water, "Implementing the Right to Water through National Legislation and Policy", *Web site The Right to Water*, [Online] available in: http://www.righttowater.info/code/Legislation_5.asp, access: march 29th of 2010.

Within the south African Constitution, the socio-economic rights are protected under the principles of a positive right, meaning that the State must respect, protect and fulfill them, giving him the duty to enforce them and to its inhabitants, the right.

The principles that are fundamental in its Constitution in relation with the right to water are³⁴: 1). Equitable access to water: in this point there has been some debate, due to amount of liters per person per day that are entitled the South Africans under their national constitution, the 25 liters are said not to be enough³⁵, in comparison with the 50 liters recommended by the WHO in its estimates³⁶. 2). Sustainable use of water and, 3). Efficient and effective water use.

The present model is very helpful due to the countries' courts capacity to review the "reasonableness" present in the policies made by the State that implement the protection of the rights present in their Constitution³⁷. This means that the State can be more easily made responsible for the violations committed, assuring a better a more progressive protection to their rights, and that the situations can be more objectively judged legally.

As mentioned before, this is just one of the examples that can be currently found internationally, and each and everyone of the them has singular characteristics corresponding the country's singular political, economical, social and legal environment.

It is of utmost importance when considering the implementation of the Human Right to Water that not only the governments should be involved, but that in the decision-making process, consultation with the civil-society and communities would make it more integrative, equitable and avoid potential problems in the future.

In addition to this, despite the fact that there is still a lot of work and effort ahead for governments, civil society and international organizations, it is possible to affirm that today, the international community is one step closer to achieve this objective. The recognition of its influence by an important amount of relevant international actors means that it is not just an utopian dream of crazy environmentalists and human rights activists.

Nevertheless, it would be naïve and simplistic to believe that this process of implementation will be done in the nearest future, it requires a long and responsible labor. Also, that with the General Comment 15, the hard work is already completed, on the contrary, it is just be-

34. *Ibid.*

35. Amy Hardberger *Op. Cit.*, p.540.

36. World, Health Organization, "Global Water Supply and Sanitation Assessment 2000 Report" *Web site* World, Health Organization, [Online] available in: http://www.who.int/water_sanitation_health/monitoring/jmp2000.pdf access: March 29th of 2010; UN World Water Development Report, *Op. Cit.*

37. What Price for the Priceless?: Implementing the Justiciability of the Right to, *Op. Cit.*, p. 1088

ginning because, on one side, under the international law umbrella, for example, it still does not qualify to be called a source, meaning that it still does not constitute a treaty, nor has all the elements required to be part of the custom. On the other side, it will deal now with opposite economic and political interests that can and certainly will mean a significantly amount of obstacles, translated in extra time, economic, political and social effort.

The international community has ahead a great responsibility that hopefully, it would know how to respond it best possible way for all.



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